No.

In The
Supreme Court of the United States

RON CATHEL,
Administrator, New Jersey State Prison;
NANCY KAPLEN,
Acting Attorney General, State of New Jersey,
Petitioners,

v.

ROBERT O. MARSHALL,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

NANCY KAPLEN
Acting Attorney General of New Jersey
ROBERT E. BONPIETRO
Deputy Attorney General
Attorney of Record
DIVISION OF CRIMINAL JUSTICE
R.J. HUGHES JUSTICE COMPLEX
P.O. Box 086
TRENTON, NEW JERSEY 08625
(609) 292-9086

January 26, 2006

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the ruling of the Third Circuit that counsel's preparation for and performance in the penalty phase of respondent's capital murder trial was deficient conflicts with the principles announced by this Court in *Strickland v. Washington*, 466 *U.S.* 668 (1984), and subsequent caselaw, in that it fails to give any deference to counsel's strategic rationale and sets forth a series of *per se* rules counsel was required to have followed.

2. Whether the ruling of the Third Circuit that respondent was prejudiced by counsel's allegedly deficient performance conflicts with this Court's jurisprudence in that the omitted mitigating evidence is merely corroborative of that presented by counsel in the guilt phase and is not relevant to respondent's blameworthiness or moral culpability.

LIST OF PARTIES

The parties below are listed in the caption, with the exception that pursuant to F.R.A.P. 43(c), Nancy Kaplen, Acting Attorney General of New Jersey, is substituted for Peter C. Harvey, former Attorney General of New Jersey.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

CASES CITED:

STATUTES CITED:

CONSTITUTIONAL PROVISIONS INVOLVED:

OTHER SOURCES CITED:

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005) and reprinted in the Appendix at 1a to 45a. The opinion of the United States District Court for the District of New Jersey is reported at *Marshall v. Hendricks*, 313 F.Supp.2d 423 (D.N.J. 2004) and is reprinted in the Appendix at 46a to 112a.

JURISDICTION

The Third Circuit's judgment was entered on November 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. § 2254(d)(1)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

This case involves a Third Circuit Court of Appeals ruling granting a habeas petition on ineffective assistance of counsel in the penalty phase of a capital murder trial. The court's decision is in direct conflict with this Court's Sixth Amendment jurisprudence in several respects. First, the lower court paid absolutely no deference to trial counsel's explanation regarding his preparation for a mitigation case and his decision to limit mitigation evidence to that presented in the guilt phase, and in fact wrongly found that there had been no preparation whatsoever. In addition, the court's opinion creates a *per se* rule that counsel in a capital case must specifically interview particular witnesses in advance of a penalty phase, despite respondent's direction that the subject not be broached with these witnesses. Moreover, the court of appeals found that counsel was required to have presented mitigating evidence in the penalty phase itself, contrary to this Court's holdings otherwise. Finally with respect to counsel's performance, the circuit court ignored recent precedent, *Bell v. Cone*, 535 U.S. 685 (2002), and *Yarborough v. Gentry*, 540 U.S. 1 (2004), and held that counsel was required to have begged the jury to spare his client's life rather than give a strategically low-key presentation designed to emphasize the State's heavy burden of proof and mute an aggressive prosecutor.

This case also presents an important question regarding the Third Circuit's ruling on prejudice – that is, whether the inclusion of mitigating evidence not relevant to moral culpability and merely corroborative of that already presented in the guilt phase would have resulted in a reasonable probability that the result would have been different.

In early 1984, respondent was a successful Toms River, New Jersey, insurance salesman, married to Maria Marshall, and the father of three teenaged sons. At the same time, respondent was carrying on an affair with Sarann Kraushaar,

and was seriously in debt. In order to be with Sarann and free himself from debt, respondent decided to have Maria killed and collect the insurance on her life. A chance meeting with Louisiana hardware store co-owner Robert Cumber at a party in Point Pleasant Beach led respondent to the man who would arrange for the hit. Under the guise of "investigating" respondent's wife, Cumber put respondent in contact with Billy Wayne McKinnon, known to respondent as "Jimmy Davis." In the months that followed, respondent and McKinnon plotted Maria's murder, through numerous telephone calls between New Jersey and Louisiana and meetings in Atlantic City; McKinnon ultimately received $20,000 to $22,000 for his efforts, with the promise of up to $65,000 more. At about the same time, respondent was dramatically increasing the amount of life insurance on his non-working spouse, to a total of $1.4 million at the time of her murder.

On September 6, 1984, the scheme was put into action. By agreement with McKinnon, on the way home to Toms River from an evening with Maria in Atlantic City, petitioner was to feign trouble with his car and pull into a secluded picnic area on the Garden State Parkway. When petitioner did so, at about 1:00 a.m., a gunman was waiting.[1] Maria Marshall was killed with two shots from a .45-caliber handgun; her husband suffered, also by prearrangement with McKinnon to make it look as if he were the victim of a robbery, a slight head wound requiring five stitches to close. McKinnon and the other man fled, ultimately arriving back in Louisiana.

Investigators quickly picked up the trail and learned of McKinnon and "Davis." After being questioned on September 21, 1984, about his knowledge of these names,

---

[1] Larry Thompson, named by McKinnon as the triggerman, was acquitted.

respondent retained Glenn Zeitz, Esq., an experienced criminal trial lawyer for ten years in both New Jersey and Pennsylvania. Zeitz knew from the outset that this case was a potential capital prosecution, and prepared the case accordingly.

Circumstances would greatly affect how Zeitz prepared. First, two days after he hired Zeitz, respondent appeared to attempt to commit suicide in the same hotel room he used to share with Sarann, mixing sleeping pills with soda, but falling asleep before drinking it. Zeitz consulted with a psychologist, and ultimately had respondent placed in a psychiatric hospital for examination, both for a potential guilt phase mental defense and for mitigation. This bore no fruit; not only was respondent indifferent to treatment, he was found to be narcissistic, manipulative, and engaging in sexually provocative behavior in the hospital.

Several tape recordings made by respondent just before the suicide "attempt" would also affect Zeitz's strategy. One, to respondent's brother-in-law, an attorney, was devastating; in it, respondent acknowledged the affair with Sarann as well as the size of his escalating debt. However, three other tapes, one to each son, would figure prominently in Zeitz's plans, both for guilt and penalty.

After McKinnon decided to cooperate and named respondent as chief orchestrator of the plot to kill Maria, respondent was arrested in late December 1984 and indicted for capital murder in early January 1985. In the months leading to trial, Zeitz became aware of an increasing negativity toward respondent in the community, including that of two of his three sons, who by the time of trial believed their father guilty. In addition, respondent himself made things difficult, insisting on a total focus on his ultimate vindication, and effectively forbidding discussion of any other result, including a possible penalty phase.